STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 4, 2006
v	No. 255641 Genesee Circuit Court
JEROME EDWIN MONTGOMERY, Defendant-Appellant.	LC No. 03-012258-FC ON REMAND

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court for consideration of certain issues initially raised by defendant. We now affirm.

The facts underlying this case are set forth in our initial opinion. See *People v Montgomery*, unpublished opinion per curiam of the Court of Appeals, issued November 22, 2005 (Docket Nos. 255641 and 255689).[1] There, we affirmed defendant's jury conviction and sentence for receiving and concealing stolen property having a value of $20,000 or more, MCL 750.535(2)(a). *Id*. at 7-8. However, we reversed his jury convictions and sentences for three counts of kidnapping, MCL 750.349, conspiracy to kidnap, MCL 750.157(a) and MCL 750.349, and first-degree home invasion, MCL 750.110a(2). *Id*. at 7.

For the reasons stated in the partial dissent,[2] our Supreme Court reinstated defendant's convictions for kidnapping, conspiracy to kidnap, and first-degree home invasion. *People v Montgomery*, 474 Mich 1098. On remand, the Supreme Court has directed us to consider "the remaining issues that were raised by defendant, but not addressed . . . ." *Id*.

Defendant argues that the trial court improperly instructed the jury with respect to the asportation element of the offense of kidnapping. We disagree. Because defendant failed to

[1] This case was initially consolidated with Docket No. 255689. Our Supreme Court has remanded only Docket No. 255641. Thus, the initial order consolidating the cases has been vacated, and Docket No. 255689 is not at issue before this Court.

[2] *Montgomery, supra* (Saad, P.J., concurring in part and dissenting in part).

preserve this argument by objecting at trial, we review the issue for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if a plain, forfeited error resulted in the conviction of an actually innocent defendant, or if an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's guilt or innocence. *Id*., citing *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Defendant does not contest his convictions for kidnapping Leonard Harrington and Reid Adomat, which were based on a theory of secret confinement. However, defendant challenges his conviction for kidnapping Deborah Harrington, which was based on the theory that he forcibly confined and transported Harrington against her will. Defendant argues that the movement necessary to satisfy the asportation element of kidnapping may not merely be movement incidental to the commission of a separate crime. Defendant argues that because the movement of Harrington was wholly incidental to the charged crime of armed robbery, the asportation element was not satisfied. Defendant asserts that the court failed to instruct the jury that the movement necessary to satisfy the asportation element of kidnapping must be separate and distinct from movement incident to any other offense.

Michigan's kidnapping statute defines six different forms of kidnapping. MCL 750.349; *People v Wesley*, 421 Mich 375, 383-384, 391; 365 NW2d 692 (1984). Secret confinement kidnapping does not include an element of asportation. *Id*. at 388. However, forcible confinement kidnapping does. *People v Vaughn*, 447 Mich 217, 224; 524 NW2d 217 (1994), overruled in part on other grounds, *Carines*, *supra* at 766. The asportation required to convict for forcible confinement kidnapping must be taken in furtherance of the kidnapping itself, and must not have been merely "movement incidental" to the commission of a coequal or lesser offense. *Id.*; see also *People v Barker*, 411 Mich 291, 300; 307 NW2d 61 (1981), overruled in part on other grounds *Wesley*, *supra* at 386.

Deborah Harrington was transported by defendant for the purpose of gaining access to and robbing the jewelry store where Harrington worked. If defendant had been convicted of both armed robbery and kidnapping, we would be required to examine the trial court's instructions and to ensure that the jury did not base the kidnapping conviction on movement that was wholly incidental to the coequal offense of armed robbery. However, because defendant was acquitted on the armed robbery charge, the jury effectively determined that the separate offense of armed robbery was not committed. Thus, there is necessarily no lesser or coequal offense to which the movement of Harrington could have been "incidental," and the jury logically could not have based its finding of asportation on movement that was wholly occasioned by the offense of armed robbery. Defendant cannot demonstrate plain error with respect to the kidnapping instructions.[3]

[3] The prosecution argues that the kidnapping of Deborah Harrington did not require proof of asportation in the first instance because it was not forcible confinement kidnapping, but rather kidnapping "with intent to extort money or other valuable thing." As the prosecution correctly notes, kidnapping "with intent to extort money or other valuable thing" does not contain the element of asportation. *Wesley*, *supra* at 389. However, the mere fact that defendant kidnapped
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Defendant next argues that he was deprived of his federal Sixth Amendment right to a jury trial when the trial court ordered his sentence for first-degree home invasion to run consecutively to his remaining sentences. Specifically, defendant argues that the trial court erred by sentencing him without first submitting to the jury the question of whether the home invasion sentence should run consecutively to the remaining sentences. We disagree. Because defendant failed to preserve this issue, we review it for plain error that affected his substantial rights. *Carines, supra* at 763-764.

A trial court "may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." MCL 750.110a(8). In *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." On the basis of *Apprendi*, defendant asserts that the trial court was not entitled to impose a consecutive sentence under MCL 750.110a(8) unless the jury first determined beyond a reasonable doubt that the first-degree home invasion "ar[ose] from the same transaction" as the other offenses for which he was convicted and sentenced.

Contrary to defendant's argument, the trial court did not exceed the statutory maximum penalty for first-degree home invasion by imposing a consecutive sentence for that offense under MCL 750.110a(8). Although the overall period of imprisonment is lengthened by consecutive sentencing, the penalty for *each specific offense* remains the same as if the individual sentences had been imposed concurrently. In other words, no individual sentence is increased beyond the prescribed statutory maximum penalty for the particular corresponding offense. As the federal courts have recognized, *Apprendi* is not violated by consecutive sentencing so long as the trial judge does not exceed the statutory maximum penalty for any individual count. *United States v White*, 240 F3d 127, 135 (CA 2, 2001); see also *United States v Le*, 256 F3d 1229, 1240 n 11 (CA 11, 2001) ("*Apprendi* does not apply when the sentences on two related offenses are allowed to run consecutively under the relevant law and the sentence on *each* offense does not exceed the prescribed statutory maximum for that particular offense") (emphasis in original). Because the trial court did not exceed the statutory maximum sentence with respect to any individual offense for which defendant was convicted, defendant can show no error.

Lastly, defendant argues on the basis of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), that he must be resentenced because the facts used to support scoring of the sentencing guidelines variables were not determined by a jury. Again, we disagree. Because this issue is unpreserved, we review it for plain error that affected defendant's substantial rights. *Carines, supra* at 763-764.

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Harrington in order to rob a jewelry store does not remove the offense from the "forcible confinement" category and place it in the category of kidnapping "with intent to extort money or other valuable thing." Kidnapping "with intent to extort money or other valuable thing" is "kidnapping for ransom," which is not present on the facts of this case. *Id*.

Blakely prohibits a sentencing court from exceeding the statutorily prescribed maximum penalty on the basis of facts not found by a jury. *Blakely*, *supra* at 304. However, the rule of *Blakely* does not apply to Michigan's indeterminate sentencing scheme, under which only the minimum penalty is subject to escalation. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Accordingly, defendant's argument in this regard is without merit.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey